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No. 95-1858

In The
Supreme Court of the United States
October Term, 1995

DENNIS C. VACCO, Attorney General of the State of New York;
GEORGE E. PATAKI, Governor of the State of New York; and
ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D.; SAMUEL C. KLAGSBURN, M.D.;
and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITION

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(202) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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MOTION OF AGUDATH ISRAEL OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Agudath Israel of America respectfully moves for leave to file the accompanying brief *amicus curiae* in the above-captioned case.

Agudath Israel is a 74-year old national Orthodox Jewish movement with a deep and abiding interest in issues that touch upon the sanctity of human life -- and, therefore, on the moral tenor of our contemporary society. This case implicates some of the most profound issues of our time. As described more fully in the accompanying proposed brief, Agudath Israel views the decision below with deep

concern and believes that it deserves the Court's urgent attention.

Agudath Israel submits that it would bring to this case a perspective not currently before the Court. The accompanying proposed brief advances an argument not fully developed in the petition: the extent to which constitutionalizing a right to assisted suicide, particularly on equal protection grounds, is likely to have an extremely broad impact in a variety of contexts. In addition, as more fully discussed in the "Interest of the Amicus Curiae" section of the accompanying proposed brief, Agudath Israel approaches the issues raised by this case from its unique perspective of classical Jewish thinking.

Counsel for petitioners have consented, in writing, to Agudath Israel's filing a brief as *amicus curiae*. Counsel for respondents, however, has withheld such consent. Hence the need for this motion.

For the reasons stated above, Agudath Israel respectfully urges the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in support of petitioners.

Respectfully submitted,

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(202) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
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DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(202) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, a national grassroots Orthodox Jewish movement founded in 1922, is deeply concerned about the ruling below and the broader

implications it holds for the future, and joins petitioners in urging the Court to grant a writ of certiorari.

Informed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws and judicial rulings that undermine the sanctity of human life send a message that is profoundly dangerous for all of society, Agudath Israel speaks out frequently, in a variety of legal policy settings, on a broad panoply of issues that arise at the onset and conclusion of the human life cycle. In this court, for example, Agudath Israel has submitted briefs as *amicus curiae* in the abortion rights cases of *Webster* v. *Reproductive Health Services* (decision reported at 492 U.S. 490 (1989)) and *Planned Parenthood* v. *Casey* (decision reported at 505 U.S. 833 (1992)); and -- more directly relevant to the issues involved in the instant case -- in the "right to die" case of *Cruzan* v. *Director, Missouri Department of Health* (decision reported at 497 U.S. 261 (1990)). Agudath Israel has also testified before the New York State legislature, as well as the New York State Task Force on Life and the Law, on the several statutes and statutory proposals discussed in the body of this brief, all of which are profoundly implicated by the decision below.

Agudath Israel's interest in the issue of physician assisted suicide is especially keen. It is a basic principle of Jewish law and ethics that "[m]an does not possess absolute title to his life or body." J.D. Bleich, *The Quinlan Case: A Jewish Perspective*, reprinted in *Jewish Bioethics* 266, 270 (Hebrew Publishing Co. 1979). Agudath Israel believes that recognition of that teaching, as expressed in the historical disapprobation of suicide and euthanasia, has served as one of the pillars of civilized societies throughout

the generations. That pillar is now in peril.

It is yet another principle of Jewish law and ethics that a doctor's role is to provide healing, not to hasten death. I. Jakobovits, *Regarding the Law Whether it is Permitted to Hasten the End of a Terminal Patient in Great Pain*, 31 *Ha-pardes* 29 (1956). Doctors who assist in the commission of suicide, even when motivated by the most humane of concerns, exceed the bounds of their own mandate and undermine public confidence in the medical profession. Agudath Israel views with considerable alarm the transformation of the physician's calling envisioned by the decision below.

Moreover, as representatives of a people whose numbers were decimated little more than half-a-century ago by a society that "progressed" from its "enlightened" practices of "mercy killing" to the mass slaughter of millions of human beings deemed physically or racially "inferior," Agudath Israel is particularly sensitive to the legal assignment of diminished levels of life protection based on diminished levels of life "quality". The dangers of such an assignment are well articulated by Siegler & Weisbard, *Against the Emerging Stream: Should Fluids and Nutritional Support be Discontinued?*, 145 Archives of Internal Medicine 130-31 (1985):

> "We have witnessed too much history to disregard how easily a society may disvalue the lives of the 'unproductive.' The 'angel of mercy' can become the fanatic, bringing the 'comfort' of death to some who do not clearly want it, then to others who 'would really be better off dead,' and finally, to

classes of 'undesirable persons,' which might include the terminally ill, the permanently unconscious, the severely senile, the pleasantly senile, the retarded, the incurably or chronically ill, and perhaps, the aged. . . . In the current environment, it may well prove convenient - and all too easy - to move from recognition of an individual's 'right to die' (to us, an unfortunate phrasing in the first instance) to a climate enforcing a 'duty to die.'"

ARGUMENT

LEFT INTACT, THE DECISIONS OF THE COURT BELOW AND OF THE NINTH CIRCUIT IN *COMPASSION IN DYING* ARE LIKELY TO LEAD TO A BROAD EXPANSION OF THE RIGHT TO ASSISTED SUICIDE AND EUTHANASIA

Earlier this year, within the space of one month, two federal circuit courts -- the Ninth Circuit in *Compassion in Dying* v. *State of Washington*, 79 F.3d 790 (9th Cir., March 6, 1996) (en banc), and the Second Circuit in the decision below, *Quill* v. *Vacco*, 80 F.3d 716 (2d Cir., April 2, 1996) -- found as-applied constitutional infirmities in Washington and New York state statutes that make it a crime to "aid" another individual in committing or attempting to commit suicide. The two rulings reached similar (though not identical) bottom lines, but arrived at their destinations through different constitutional routes.

The Ninth Circuit found a due process "liberty interest in choosing the time and manner of one's death," 79 F.3d at 798; and determined, in the context of "competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors," that such due process liberty interest outweighed any countervailing interest asserted by the state. *Id.* at 838. The Second Circuit, in contrast, rejected the notion that there is any fundamental due process right to assisted suicide. 80 F.3d at 723-25. Instead, it relied on the equal protection clause in holding that physicians are constitutionally permitted to "prescribe drugs to be self-administered by mentally competent adults who seek to end their lives during the final stages of a terminal illness." *Id.*

at 718. Such persons, reasoned the court, are "similarly circumstanced" to final-stage terminally ill patients who enjoy the statutory and common law right to hasten their death by authorizing termination of life support, *id.* at 729; and, the court concluded, there is no legitimate state interest rationally served by distinguishing between the two categories. *Id.* at 730-31.

Both grounds of decision, Agudath Israel submits, are wrong. The better of the legal argument, we believe, is with the dissenting judges in the Ninth Circuit *en banc* decision (79 F.2d at 839 (Beezer, J.), 857 (Fernandez, J.) & 857 (Kleinfeld, J.)); with the Ninth Circuit's earlier panel opinion in *Compassion in Dying* v. *State of Washington,* 49 F.3d 585 (9th Cir. 1995); and with the Michigan Supreme Court in *People* v. *Kevorkian,* 447 Mich. 436 (1994), *cert. denied* 115 S. Ct. 1795 (1995).

Aside from being bad law, the rulings of the Ninth and Second Circuits are profoundly dangerous. Left intact, they are likely to lead to a broad expansion of the right to assisted suicide and euthanasia, far beyond the narrow confines of the particular contexts in which they arose. This is especially so, as demonstrated *infra*, with respect to the equal protection doctrine enunciated in the Second Circuit below.

Implications of the Ninth Circuit's Due Process Liberty Interest Analysis

The Ninth Circuit's *en banc* holding is itself broader than one might at first blush imagine: it encompasses, at least in Washington State, not only the decisions of persons who are terminally ill as that term is typically understood,

but also of persons who are in an irreversible coma or a persistent vegetative state, 79 F.3d at 831 & n.117; and also the decisions of duly appointed surrogate decision makers, *id.* at 832 n. 120. Moreover, as the court itself acknowledged, the logic of its due process analysis might well lead to active euthanasia for terminally ill patients:

> "We do not dispute the dissent's contention that the prescription of lethal medication by physicians for use by terminally ill patients who wish to die does not constitute a clear point of demarcation between permissible and impermissible medical conduct. We agree that it may be difficult to make a principled distinction between physician-assisted suicide and the provision to terminally ill patients of other forms of life-ending medical assistance, such as the administration of drugs by a physician. We recognize that in some instances, the patient may be unable to self-administer the drugs and that administration by the physician, or a person acting under his direction or control, may be the only way the patient may be able to receive them." 79 F.3d at 831 (footnote omitted).

Slippery though the Ninth Circuit slope may be, its incline is likely not to be quite so steep. For, as the court pointed out, the due process constitutional claim of a patient seeking suicide assistance will be determined, like all substantive due process claims, by weighing the strength of the various competing interests present in any given circumstance. The court's painstaking calibration of those competing interests led it to its bottom line determination: "The liberty interest at issue here...in the case of the terminally ill, is at its peak. Conversely, the state interests,

while equally important in the abstract, are for the most part at a low point here." 79 F.3d at 837. While Agudath Israel believes that the Ninth Circuit incorrectly undervalued the state's interest in preserving the life of even terminally ill persons -- "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life," *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990) -- there is at least some basis to take comfort that the due process balancing framework will enable courts, in cases involving non-terminal patients, where the balance of competing interests tips in favor of the state, to draw the line: "So far down the slope, but no farther."

Implications of the Second Circuit's Equal Protection Analysis

The equal protection framework embraced by the Second Circuit, in contrast, would appear to include no such breaking mechanism. Once one accepts the court's conclusion that there is no meaningful distinction between assisted suicide and withholding or withdrawal of life-sustaining treatment, so that a patient who seeks termination of life support and a patient who seeks poison are "similarly circumstanced persons" who must be treated identically unless the state can demonstrate that treating them differently rationally advances a legitimate state interest, 80 F.3d at 729; and once one accepts the Second Circuit's additional conclusion that no such rational basis of distinction exists when the two persons are in the final stages of terminal illness, *id.* 730-31 -- there is no readily apparent logical way of drawing lines anywhere along the slope.

In concluding that the prohibition against assisted suicide, as applied to final-stage terminally ill patients, violates the equal protection clause, the Second Circuit posed a series of dramatic questions, and an equally dramatic answer:

> "But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes... And what business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' [citation omitted], when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: 'None.'" 80 F.3d at 729-30.

The questions are indeed dramatic, and so is the response -- but they are also highly misleading. For they imply that the equal protection analysis would be different in cases where the state's interest in preserving life would be stronger than the Second Circuit deems it to be at the final stages of terminal illness. In fact, however, it should make no equal protection difference whatsoever how far along the patient's terminal illness has progressed, or even whether he is terminally ill altogether.

The relevant equal protection inquiry here is *not* how strong the state's interest is in preserving life in any given

context, but whether treating "similarly circumstanced" persons differently -- in the Second Circuit's view, those who refuse life sustaining treatment and those who seek poison -- is rationally related to a legitimate state interest. As the Court stated in *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985): "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if *the distinction* rationally furthers a legitimate state purpose." *Id.* at 618 (footnote omitted; emphasis added). If "[t]he ending of life by [withdrawal of life support] is nothing more nor less than assisted suicide," 80 F.3d. at 729, and if the disparate treatment cannot be constitutionally justified when the two similarly circumstanced individuals are in the final stages of terminal illness, it is difficult to see why the disparate treatment can be justified when the two similarly circumstanced individuals suffer from an entirely curable disease.

The implication of the Second Circuit's ruling, therefore, is that *wherever* the law permits an individual to forgo life support, equal protection demands that it also permit him to request a lethal prescription. That implication is nothing less than staggering, and merits this Court's careful scrutiny.

Consider the body of New York law implicated most directly by the ruling below. The right of competent persons to decline or discontinue life-sustaining medical intervention was first established at common law in *Schloendorf* v. *Society of New York Hospital*, 211 N.Y. 125, 129 (1914), where Judge Cardozo enunciated the basic doctrine of personal autonomy in medical decision-making:

"[E]very human being of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *In re Storar*, 52 N.Y. 363, 376-77, *cert. denied*, 454 U.S. 858 (1981), makes clear that the common law right of personal autonomy includes the right to refuse treatment necessary to preserve one's life. The New York courts have not limited such right to patients who are terminally ill -- certainly not to patients who are in the final stages of their terminal illness. Given the Second Circuit's rejection of any distinction between refusing life support and requesting poison, if a young patient with a good prognosis for recovery enjoys the common law right to refuse a life-saving operation, should he not also enjoy the right to a lethal prescription?

The same question will apply when a third party is legally authorized to make a decision on an incapacitated patient's behalf. Under New York common law, "the right to decline treatment is personal and...could not be exercised by a third party when the patient is unable to do so" unless there is "clear and convincing evidence" that the incapacitated patient would have refused life support. *Matter of Westchester County Medical Center*, 72 N.Y. 2d 517, 528-29 (1988). New York's legislature, however, has started moving away from the "clear and convincing evidence" standard. Most notably, in 1990, a statute was enacted empowering a duly designated health care agent to make virtually any life-and-death treatment decision on behalf of his incapacitated principal, irrespective of the principal's medical condition or prognosis. Such decisions are to be made on the basis of the principal's wishes; or, where the principal's wishes "are not reasonably known and

cannot with reasonable diligence be ascertained," on the basis of the principal's "best interests." N.Y. Public Health Law § 2982 (McKinney's 1993). And, currently pending in the state legislature is proposed new legislation developed by the New York State Task Force on Life and the Law, S. 5020 / A.6791, which would empower surrogates -- third parties appointed by the *law*, not by the *patient* -- to make decisions under certain medical circumstances to refuse life-sustaining treatment where the patient's "best interests" would be so served. The Second Circuit's equal protection analysis, it would seem, should empower such agents or third party surrogates to ask that the patient be provided with poison as well, so long as they deem it to be in the patient's "best interests."

There is yet one other noteworthy aspect of New York law: the legal obligation of an individual health care provider to carry out the instructions of patients and their duly appointed health care agents; or, if doing so would violate the provider's religious beliefs or sincerely held moral convictions, to cooperate in facilitating transfer of the patient to another medical practitioner who is prepared to carry out such wishes. N.Y. Public Health Law § 2984 (McKinney's 1993). If a doctor has religious beliefs or moral convictions that preclude him from helping the patient commit suicide, ought not equal protection require his cooperation in transferring the patient to a doctor who has no such qualms?

New York is not atypical in its recognition of a patient's right to decline life-sustaining interventions, either personally or through an agent or surrogate; if anything, New York's common law takes a harder line in insisting on clear and convincing evidence of an incapacitated patient's

wishes. See *Cruzan* v. *Director, Missouri Dept. of Health*, *supra*. If the Second Circuit's ruling is permitted to stand, its impact will be widespread, profound -- and, in our view, devastating.

CONCLUSION

The constitution can be a powerful engine of social change -- for better, and for worse. As Agudath Israel sees it, the Ninth Circuit's application of due process to the question of assisted suicide, and even more so the Second Circuit's application of equal protection, are examples of constitutionalism at its most dangerous.

For the reasons stated in the petition, and the additional reasons set forth herein, Agudath Israel of America respectfully urges the Court to grant a writ of certiorari and clarify the limits of constitutional moral revolution.

Respectfully submitted,

ABBA COHEN
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DAVID ZWIEBEL*
MORTON M. AVIGDOR
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(202) 797-9000

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Agudath Israel of America

* Counsel of Record

Agudath Israel wishes to acknowledge the efforts of Joshua Beiser, a student at the Columbia School of Law, whose research contributed to the development of this brief.

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